14

Supreme Court, U.S.
FILED
MAY 2 3 2003
OFFICE OF THE CLERK

No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF OF TELECOMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANDREW L. KURTZMAN
DEREK R. KHLOPIN
TELECOMUNICATIONS
INDUSTRY ASSOCIATION
Suite 300
2500 WILSON BLVD.
Arlington, VA 22201
(703) 907-7700

DONALD I. BAKER
(Counsel of Record)
W. TODD MILLER
BAKER & MILLER, PLLC
Suite 1000
915 15th Street, NW
Washington, DC 20005
(202) 637-9499

May 23, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE NEED FOR REASONABLY CLEAR AND PREDICTABLE ANTITRUST RULES IN A CAPITAL INTENSIVE NETWORK ENVIRONMENT	5
II. ANY "ESSENTIAL FACILITIES" DOCTRINE MUST BE LIMITED TO EXLUSIONARY OR PREDATORY DENIAL OF ACCESS TO FACILITIES THAT ARE TRULY "ESSENTIAL."	7
A. The "Essential Facilities" Doctrine, to the Extent that it May Apply outside the Joint Venture Area, is but a Particular Application of Normal Sherman Act Section 2 Rules	7
B. The Extensive Access Obligations Imposed on Incumbent Carriers under the Tele-communications Act of 1996 Cannot be Equated with the More Limited Duties Imposed on a Monopolist under Section 2 of the Sherman Act	13
1. The Legal Obligations are Different	13
2. It Would be Novel and Counter-productive to Use an Antitrust "Essential Facilities" Remedy Where Access is Being Provided and Terms Regulated by Another Regulatory Regime	15

TABLE OF CONTENTS—Continued

	Page
3. Rule 12(b)(6) Dismissal of the "Essential Facilities" Claim is Proper	17
C. An Expansive Application of an Antitrust "Essential Facilities" Doctrine is Likely to Lead to Under-Investment in Relevant Facilities	18
III. THE SECOND CIRCUIT'S "MONOPOLY LEVERAGING" THEORY SHOULD BE OVERRULED	20
A. "Competitive Advantage" Is Not An Appropriate Basis for Imposing Section 2 liability	21
B. As in Cooperweld, State Oil and Spectrum Sports, this Case Offers an Opportunity to Put to Rest an Aberrant Body of Law	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES	Page
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	6, 11
Associated Gen. Contractors v. California Council of Carpenters, 459 U.S. 519 (1983)	17
AT&T Corp. v Iowa Utils. Bd., 525 U.S. 366 (1999)	*passim*
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	20
Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979)	5
Cavalier Tele., LLC v. Verizon Virginia, Inc., Slip Opinion 17 (4th Cir. May 20, 2003)	*passim*
Copperweld Corp. v. Independence Tube Co., 467 U.S. 752 (1984)	23
Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992)	6
Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)	22
Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)	*passim*
Intergraph Corp. v Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999)	22
MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)	9-10
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	*passim*
Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)	*passim*
State Oil Co. v. Khan, 522 U.S. 3 (1997)	23
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	15

TABLE OF AUTHORITIES—Continued

	Page
United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)	11, 21-22
United States v. AT&T, 552 F.Supp 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983)	16-17
United States v. Colgate & Co., 250 U.S. 300 (1919)	11
United States v. Griffith, 334 U.S. 100 (1948)	21-22, 23
United States v. Terminal R.R. Ass'n., 224 U.S. 383 (1912)	7-8
Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002)	3, 13
Virgin Atl. Airways Ltd. v. British Airways PCL, 257 F.3d 256 (2d Cir. 2001)	22

STATUTES

Sherman Act, 15 U.S.C. § 2	*passim*
Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56	*passim*

OTHER MATERIALS

P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002)	*passim*
P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989)	14
D. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999	8, 14
S. Breyer, Regulation and Its Reform (1982)	14
M. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998)	19

TABLE OF AUTHORITIES—Continued

	Page
T. Jorde, G. Sidak and D. Teece, *Innovation, Investment, and Unbundling*, 17 Yale J. Reg. 1 (2000)	6
Telecommunications Industry Ass'n., 2003 Tele communications Market Review and Forecast (2003)	18

INTEREST OF *AMICUS CURIAE*[1]

The Telecommunications Industry Association ("TIA") is a trade association that represents the interests of approximately 1000 members that manufacture and sell communications equipment. The products manufactured by its members include products that are intended for use by carriers (such as network switches), by business users (such as PBX systems) and by consumers (such as mobile telephones). Collectively, the TIA members have a strong interest in public policies that encourage communications users to increase the intensity of their usage of telecommunications products and communications carriers to increase their output of services and thereby to expand their facilities.

TIA's basic concern is that the "essential facilities" and "monopoly leveraging" rules announced by the Second Circuit in the case below, and which were immediately embraced in dozens of "copycat" cases, will have the exact opposite effect. Faced with such legal uncertainty, incumbent local exchange carriers ("ILECs") such as petitioner will be less likely to invest in new facilities; and new competitive local exchange carriers ("CLECs") also will have less incentive to invest in new facilities.

The reason for this double effect is spelled out in greater detail in Part II.C., below. Suffice it to say here that an ILEC's willingness to invest in new network capacity is

---

[1] The parties to this action have filed a blanket consent to the filing of amicus briefs with the Clerk of Court. Pursuant to Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part. No persons other than the amicus curiae, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

reduced because of the concern that such an investment will not be justified by future demand for such a capacity. What the Second Circuit's opinion does, however, is to magnify that natural business risk by the legal reality that some antitrust court or jury will compel the ILEC to displace its own communications traffic in order to share its facilities on an uneconomic basis (or award treble damages against it for its failure to do so). Meanwhile, the CLECs are discouraged from investing in new facilities because they have "free rider" opportunities. If they reasonably believe that the Second Circuit's "essential facilities" or "monopoly leveraging" doctrines can and will be used to compel ILECs to share its facilities at below fully allocated cost, they have lower incentive to make an investment in facilities themselves. The net result is likely to be lower demand for communications equipment by carriers in the short run, and lower output of communications services for users in the long run.

Moreover, the uncertainty posed by lawsuits on these grounds will only exacerbate the uncertainty already enveloping the telecommunications industry by the ongoing implementation of the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, ("1996 Act") by the Federal Communications Commission ("FCC"). TIA has actively participated in many of the FCC rulemaking proceedings involving the local competition portions of the 1996 Act with a consistent focus on encouraging investment in existing and emerging technologies and promoting facilities-based competition.

INTRODUCTION AND SUMMARY OF ARGUMENT

This private case seeks to piggyback an antitrust remedy on top of a FCC consent decree dealing with the apparent failure of petitioner's predecessor, Bell Atlantic Corporation,

to comply fully with its obligations to share its facilities with CLECs under the 1996 Act. On the day after the FCC order, this case was filed as a class action for treble damages by a customer of one of the CLECs; it alleged in very conclusory terms that Bell Atlantic's failure to comply with its special obligations to provide access under the 1996 Act also constituted a violation of Section 2 of the Sherman Act and that, as a consequence, the plaintiff had received inferior service for which it was entitled to damages. The District Court dismissed the case for failure to state a claim under either the 1996 Act or the Sherman Act, but the Court of Appeals for the Second Circuit reinstated the antitrust complaint based on what it labeled the "essential facilities" and "monopoly leveraging" doctrines.

The 1996 Act's compulsory sharing provisions are exceedingly complex and controversial. The statute requires the FCC, state public service commissions, and mediators to resolve disputes over required access and terms. See generally *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) *("Verizon")*. It would be the height of folly to stretch Sherman Act jurisprudence beyond its rational basis (as the Second Circuit has done) in order to add a private antitrust remedy on top of such a complicated and specialized regulatory system. This point is underscored by the fact that respondent's case was triggered by an FCC consent order in which Bell Atlantic had agreed to correct a performance glitch in its software, pay $3 million to the U.S. Treasury, and pay $10 million in compensation to affected CLECs, including respondent's supplier.

The Second Circuit decision appears to rest on a finding that Bell Atlantic operated in two markets–a "wholesale" market for network elements that might be provided to CLECs under the 1996 Act, and a "retail" market for local telephone services provided by both petitioner and CLECs.

The court of appeals invoked two arguable antitrust principles as the basis for finding that petitioner's conduct in the "wholesale" market might give rise to a claim by a purchaser in the "retail" market. One is an "essential facilities" theory under which the Court said "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." Pet. App. at 29a. The other is a "monopoly leveraging" theory under which petitioner used "monopoly power over a wholesale market . . . to gain competitive advantage in a retail market." Pet. App. at 30a.

Section 2 of the Sherman Act makes single firm conduct illegal if, and only if, it constitutes (i) *monopolization* by excluding actual or potential competitors from the market, or (ii) *attempted monopoly* by predatory means that create a dangerous probability of monopoly. See *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 448 (1993). Both the "essential facilities" and "monopoly leveraging" theories, as articulated by the Second Circuit, go beyond the well-established Section 2 standards by imposing liability on a legitimate monopolist for undertaking activities to "gain competitive advantage." This approach is at fundamental odds with the basic Sherman Act policies that allow any enterprise a broad right to refuse to deal and any monopolist the broad right to compete vigorously and effectively. The Sherman Act, unlike the 1996 Act, does not require any competitor to *affirmatively assist* another competitor.

As explained below, the Second Circuit's articulation of a "monopoly leveraging" doctrine (based on use of monopoly power in one market to gain a *competitive advantage* in another market) ought to be entirely abandoned; and the "essential facilities" doctrine, at a minimum, ought to be

clarified to relate to the *remedies* to be applied where the defendant is monopolizing or attempting to monopolize a particular market. As the Solicitor General explained in his brief in support of certiorari, "an *antitrust* duty to provide such access [only applies where] any refusal to deal was predatory or exclusionary, i.e., that the refusal would not make business sense *unless* it tended to limit or soften competition." SG Br. at 13.

ARGUMENT

I. THE NEED FOR REASONABLY CLEAR AND PREDICTABLE ANTITRUST RULES IN A CAPITAL INTENSIVE NETWORK ENVIRONMENT.

"[E]asy labels do not always provide ready answers" in the antitrust area, as Justice White observed in the Court's landmark decision in *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 8 (1979). Nowhere has this point been clearer than in the areas labeled "essential facilities" and "monopoly leveraging." Professors Areeda and Hovenkamp make the point precisely in discussing the "essential facility" label:

> '[E]ssential facility' is just a epithet describing the monopolist's situation . . . . It is not an independent tool of analysis but only a label–a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications already considered at length in this chapter.

IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772a, at 175 (2d ed. 2002) ("*Antitrust Law*"). This is clearly what happened when the Second Circuit sustained plaintiff's conclusory complaint that its supplier had been denied equal

access to network elements and petitioner had "no valid reason" for its actions.

The legal situation has been complicated by confusion over the exact scope of duties to deal required by this Court's decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (*"Aspen Skiing"*), and *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). Each placed limits on an alleged monopolist's ability to refuse to deal. Neither employed the "monopoly leveraging" or "essential facilities" labels, and neither involved a large capital intensive market of the type at issue in the present case. But these decisions–especially *Aspen Skiing* – have created some important echoes in the "monopoly leveraging" and "essential facilities" areas. See, e.g., IIIA Areeda & Hovenkamp, *supra* ¶ 772c2, at 186-90 (entitled: *"Aspen: problematic reach and potential limitations"*).

The problem of legal confusion over compulsory access rules is particularly critical where large capital-intensive networks are involved. Investment in such networks requires advance planning and a reasonable expectation that prudent investments will be rewarded. Legal risk is part of the investment equation. Uncertain rules regarding whether, when and on what terms the network operator may have to share a new investment (or pay treble damages for not having done so) are a clear deterrent to making the original investment and maintaining it. See *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J. concurring) (*"Iowa Utilities"*); and T. Jorde, G. Sidak and D. Teece, *Innovation, Investment, and Unbundling*, 17 Yale J. Reg. 1, 7 (2000) ("A firm's decision to invest in facilities and innovative activity depends upon its weighing the probability of earning excess return from the investment against the risk of investment loss.").

This case offers this Court a chance to reduce uncertainty in network industries generally and clarify when, if ever, antitrust access requirements should be piled on top of the extensive access and assistance requirements in the 1996 Act.

II. ANY "ESSENTIAL FACILITIES" DOCTRINE MUST BE LIMITED TO EXLUSIONARY OR PREDATORY DENIAL OF ACCESS TO FACILITIES THAT ARE TRULY "ESSENTIAL."

A. The "Essential Facilities" Doctrine, to the Extent that it May Apply outside the Joint Venture Area, is but a Particular Application of Normal Sherman Act Section 2 Rules.

The "essential facilities" concept began with this Court's decision in *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383 (1912). A group of railroads that collectively controlled an extensive and unique set of yard and terminal facilities accessing the trans-Mississippi bridges in St. Louis were denying access to these facilities to certain railroads. Rejecting the Justice Department's recommendation that the terminal be broken up, the Court ordered that membership in the joint venture be granted to all connecting railroads or the facilities use be allowed on a non-discriminatory basis. *Id.* at 411-12. There was apparently adequate capacity to handle additional traffic and a non-discrimination remedy was fairly straightforward. Interestingly the Court emphasized that "one of the fundamental purposes of the [Sherman Act] is to protect, not destroy, rights of property" and new members of the joint venture would have to share the burdens borne by

the original partners as well as the benefits of ownership. *Id.* at 409-12.

The *Terminal Railroad* principle has been invoked in various subsequent joint venture cases under Section 1, but often with less clarity on rationale and less successful results. See, e.g., D. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?,* 1993 Utah L. Rev. 999, 1025-36 & 1068-72 (discussing *Associated Press v. United States,* 326 U.S. 1 (1945), and its aftermath). But in these joint venture cases, the courts could still fashion a relatively straight-forward remedy of equal access to membership.

The situation is a lot more complicated where the issue is whether to compel access to the facilities of a legitimate monopolist (as is claimed by respondent in this case). Mandating access in such circumstances creates an even greater danger of blunting the monopolist's incentives to invest, innovate, and run its business.

This reality explains why this Court has clearly been more reluctant about compelling something like "essential facilities" access under Section 2 of the Sherman Act where there was a *unilateral* refusal to deal. The Court's closest brush with this issue in the Section 2 context was *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) *("Otter Tail").* Defendant was a dominant regional electric utility which generated power, transmitted it over the only transmission system available, and sold power to retail customers in those areas where it had been granted franchises by the local government. After several local communities declined to renew the defendant's franchises and took over their own electric retail distribution, the defendant refused to supply these communities wholesale power or to "wheel" power to them from other bulk power

suppliers. The Sherman Act § 2 violation was the defendant's effort to eliminate potential competition in the local franchised retail distribution markets by targeting these particular "turncoat" towns, while continuing its normal practice of selling wholesale power and wheeling government power to towns that had long-standing municipal power systems.[2] As the Fourth Circuit just recently explained:

> In *Otter Tail,* the utility *was* in the business of wheeling power and selling electricity at wholesale, and its refusal to engage in such business with municipalities that posed a competitive threat to the utility was found to be an improper maintenance of monopoly power.

Cavalier Tele., LLC v. Verizon Virginia, Inc., Slip Opinion 17 (4th Cir. May 20, 2003) *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/021337.P.pdf ("*Cavalier*"). In *Otter Tail,* the Supreme Court found that, because the Federal Power Commission lacked the statutory authority to compel wheeling, "there is no conflict with the authority of the Federal Power Commission" when "the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail." 410 U.S. at 376. In fact, the decree provided that the Commission should set the wheeling rates for the court. *Id.* at 381-82.

The most frequently cited decision on providing an "essential facilities" remedy against a single firm monopolist is *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The lower court

---

[2] "The District Court found....that Otter Tail's refusal to sell at wholesale or to wheel power were solely to prevent municipal power systems from eroding its monopolistic position" in local markets. 410 U.S. at 378.

had decided that AT&T had improperly refused MCI's access to the local monopoly networks that AT&T controlled in order to protect its near monopoly of long distance service. This refusal was found by the court of appeals to have "constituted an act of monopolization." *Id.* at 1133. The Seventh Circuit explained that "[s]uch a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another." *Id.* at 1132. In this case, the court ordered AT&T to make this essential facility "available on non-discriminatory terms," noting that "*Otter Tail* provides an analogy to the instant problem." *Id.* at 1132, 1133.

The court articulated four elements that were necessary for an antitrust court to order such an "essential facilities" remedy: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of access to the facility to a competitor; and (4) the feasibility of providing access to the facility. *Id.* This four-part test was about the *remedy* where the defendant was found to have committed an "act of monopolization." Interestingly, the court of appeals rejected MCI's attempt to have AT&T ordered to provide access to its long distance network in order to "fill out" MCI's incomplete system. *Id.* at 1148-49.[3]

Thus the critical question not faced by the Second Circuit is: what kind of a Section 2 violation will give rise to an

[3] "MCI's primary business was to build precisely the type of facilities to which it sought access from the Bell System. There was no sufficient explanation as to why MCI, on the one hand, was building its own network, and, on the other, was entitled to access in the interim to AT&T's facilities." 708 F.2d at 1148.

"essential facilities" type of remedy? Being a monopolist is, of course, not a violation of Section 2. Even under Judge Learned Hand's expansive approach to Section 2 liability, "there must be some 'exclusion' of competitors . . . or . . . some 'unduly' coercive means must be used." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) ("*Alcoa*"). Judge Hand recognized, in oft-quoted language: "The successful competitor, having been urged to compete, must not be turned on when he wins." *Id.* at 430. Rather, such a monopolist is entitled to enjoy the fruits of its "skill, foresight and industry." *Id.* In sum, a monopolist enjoys a broad (but not absolute) right to make commercial choices and "freely to exercise his own independent discretion as to the parties with whom he will deal" under the doctrine in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Because of the risk that Section 2 concerns will chill procompetitive activities by a legitimate monopolist, this Court has made clear that Section 2 only restricts conduct that (a) "actually monopolizes or dangerously threatens to do so," *Spectrum Sports*, 506 U.S. at 459, and (b) cannot be justified as efficiency enhancing or profitable in its own right, *Aspen Skiing*, 472 U.S. at 605-10. This means that a monopolist's refusal to deal only becomes illegal if it cannot be justified economically except as a way of forestalling entry or destroying a competitor. So long as a refusal to deal is more immediately profitable for the monopolist than dealing with a competitor, it should be treated as legitimate under Section 2.[4] This is essentially what the Solicitor General stated in his brief in support of certiorari, "an

[4] "[S]hort-term profitability must be a complete defense" in an "essential facilities" case. III P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f, at 131-132 (2d ed. 2002). "As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger." *Id.* at 132.

antitrust duty to provide such access [only applies where] any refusal to deal was predatory or exclusionary, i.e., that the refusal would not make business sense *unless* it tended to limit or soften competition." SG Br. at 13. The Solicitor General added that, "exclusionary conduct normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power." *Id.*, citing *Aspen Skiing*, 472 U.S. at 608 & 610-11.

The point is well illustrated by *Otter Tail*. By targeting the towns that had failed to renew their franchise, the defendant was foregoing the same wholesale power and wheeling revenues that it received from other long-standing municipal system customers. See *Cavalier*, Slip Op. at 17. Such an exercise involved sacrifice of short term profits in order to protect its retail monopolies in other town where it had franchises.

By contrast, in the present case, there is no sacrifice of short-term profits. Rather, Bell Atlantic's use of its own facilities for its own services is clearly likely to be more profitable than providing subsidized low-priced access to CLECs under the 1996 Act. While Congress may have decided, in enacting the 1996 Act, that forcing the telecommunications "monopolist" to sacrifice the greater profits that could be earned from operating its own system was in the public interest of promoting competition in the telecommunications sector, there is nothing to suggest that additional liability under Section 2 of the Sherman Act when the monopolist makes the economic rationale decision to deny access was contemplated. Instead, the remedy for such denials was set forth in the 1996 Act.

B. The Extensive Access Obligations Imposed on Incumbent Carriers under the Telecommunications Act of 1996 Cannot be Equated with the More Limited Duties Imposed on a Monopolist under Section 2 of the Sherman Act.

1. The Legal Obligations are Different

The Court is clearly familiar with the breadth and novelty of the compulsory access provisions contained in Sections 251-252 of the 1996 Act from its consideration of the *Iowa Utilities* and *Verizon* cases. ILECs were required to offer CLECs a variety of services and facilities at heavily discounted prices in order to "give aspiring competitors every possible incentive to enter local retail telephone markets." *Verizon*, 535 U.S. at 489. Thus Congress created "something brand new"–which the Court called "the wholesale market for leasing network elements." *Id.* at 528. These obligations, unlike those under the antitrust laws, are triggered simply by being the incumbent carrier, and they are not tied to exclusionary effects or predation.

The Seventh Circuit Court of Appeals recognized this key distinction in rejecting an earlier attempt by a plaintiff to equate 1996 Act obligations with duties under the Sherman Act. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) (*"Goldwasser"*). As Judge Diane Wood explained for the Court:

> [I]n an effort to jump-start the development of competitive local markets, [Congress] imposed a host of special duties on the ILECs . . . . These are precisely the kinds of affirmative duties to help one's competitors that we have noted do not exist under the unadorned antitrust laws.

Id. at 399-400. The opinion further explained that therefore:

> [a] complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that it could challenge its monopoly; the prices I must pay X are therefore too high" does not state a claim under Section 2.

Id. at 400. Accord, *Cavalier*, Slip Op. at 19 (result dictated by "the special, indeed idiosyncratic, relationship between the Telecommunications Act and the Sherman Act").

This point is both obvious and has been long recognized. Antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do." S. Breyer, *Regulation and Its Reform* 157 (1982). Thus the judicial remedy in the joint venture type of "essential facilities" cases has been an injunction against enforcement of a discriminatory membership or other rule. See P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989); *Compulsory Access*, 1993 Utah L. Rev. at 1117-18. As already noted, the same type anti-discrimination injunction was the basis for relief approved by this Court in *Otter Tail*. By contrast, the access regime under the 1996 Act is about setting, and settling disputes over, prices and terms for use of very specific facilities by CLECs.

2. It Would be Novel and Counter-productive to Use an Antitrust "Essential Facilities" Remedy Where Access is Being Provided and Terms Regulated by Another Regulatory Regime.

Apparently no court has ever tried to invoke an antitrust "essential facilities" rule or remedy where access was being provided under a regulatory statute. Indeed, this Court's important decision in the *Otter Tail* case authorized compulsory access in circumstances where the Federal Power Commission lacked authority to order it. 410 U.S. at 366.

Not allowing the antitrust court and a regulatory agency to impose different access obligations and terms on the same monopolist makes eminent sense, and will reduce uncertainty and opportunism in what is necessarily a sensitive process. Indeed the Court's "primary jurisdiction" cases going all the way back to *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), represent a more sensible balance between the application of regulation and antitrust liability. The case for such restraint by the antitrust court is particularly strong in the telecommunications area because of the complexity of the access arrangements under the 1996 Act. The 1996 Act reflects a balance of the Congressional objectives "to promote competition . . . reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies." 1996 Act, Preamble. Otherwise, as the Seventh Circuit explained:

> The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders

> in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the Section 252 agreements.

Goldwasser, 222 F.3d at 401. The Fourth Circuit has just reached the same conclusion in even stronger terms in *Cavalier* :

> [If] every violation of §§ 251 and 252 of the Telecommunications Act could be asserted as a violation of the Sherman Act merely by alleging that the conduct was undertaken with an intent to monopolize, . . . the procedures and remedies specified by Congress for violations of the Telecommunications Act would become subservient to, indeed overrun by, the Sherman Act . . . . Enforcement under the Sherman Act would effectively collapse enforcement of the Telecommunications Act, leaving only one effective means–the treble damage suit.

Cavalier, Slip Op. at 21. Accordingly, even though there is no antitrust immunity, the "more specific [access] legislation must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Goldwasser,* 222 F.3d at 401.

Such an approach is supported by the fact that the 1996 Act access arrangement is novel, experimental, capable of adjustment and presumably temporary. Antitrust decrees and orders are less capable of adjustment in response to experience, which is probably why Congress terminated the Modified Final Judgment in *United States v. AT&T,*[5] and

[5] 552 F.Supp 131 (D.D.C. 1982) (Modified Final Judgment), *aff'd sub. nom. Maryland v. United States,* 460 U.S. 1001 (1983).

switched detailed regulatory responsibilities from the antitrust court to the FCC. When the FCC finds that "the transitional regulatory regime [under 1996 Act] can be dismantled, [then] the background antitrust laws can move to the fore." *Goldwasser*, 222 F.3d at 402.

3. Rule 12(b)(6) Dismissal of the "Essential Facilities" Claim is Proper

If no "essential facilities" claim under Sherman Act Section 2 is to be allowed in the same area in which access is being provided under another statute, then the respondent's "essential facilities" claim does not present "the kind of question that requires further development of a factual record" and dismissing it under Rule 12(b)(6) is an appropriate course, as in *Goldwasser*. 222 F.3d at 401. See also *Cavalier,* Slip Op. at 22.

It is also a highly desirable course. Having to endure discovery is expensive and disruptive and prolongs the uncertainty faced by petitioner until a summary judgment motion can be briefed and argued in this other pending cases. See *Associated Gen. Contractors v.. California Council of Carpenters,* 459 U.S. 519, 528 n.17 (1983) (justification needed to allow "potentially massive factual controversy to proceed"). The urgency of this point is underscored by the numerous copycat cases that have been filed in the district courts of the Second Circuit alone, since the court of appeals decision in this case.

C. An Expansive Application of an Antitrust "Essential Facilities" Doctrine is Likely to Lead to Under-Investment in Relevant Facilities.

Underinvestment-in telecommunications facilities because of perceived legal risk is a matter of special concern to Amicus Telecommunications Industry Association. TIA strongly believes that prolonged legal uncertainty and multiple antitrust litigations will cause both ILECs and CLECs to reduce their investments in network capacity and capability.[6]

First, there is the issue of the ILECs. Justice Breyer clearly recognized this issue in his concurring opinion in *Iowa Utilities,* where he noted that compulsory sharing:

> may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research or labor; [n]or can one guarantee that firms will undertake the investment necessary to produce complex technical innovations knowing that any competitive advantage derived from those innovations will be dissipated by the sharing requirement.

[6] "Substantial investment in network equipment continues be undertaken by local exchange carriers, although it is quite cyclical." See Telecommunications Industry Ass'n., 2003 Telecommunications Market Review and Forecast at 55 (2003). For example, in 2002, the industry spending on network equipment was still $22.0 billion—less than half of the 2000 figure—but continued growth in annual network equipment spending is projected up to $30.4 billion in 2006. *Id.* The same report also notes that, "the requirement to share equipment with competitors has inhibited ILEC investment and dampened the incentive to market DSL..." *Id.* at 60.

Iowa Utilities, 525 U.S. at 428-29. Justice Breyer was writing about the 1996 Act, but the point applies even more strongly to compulsory access decisions under the Sherman Act, where the results of cases may be even harder to predict, treble damages may be imposed and the injunctive orders may be more long lasting. In sum, the issue boils down to a risk/reward evaluation at the time the incumbent has to make investment choices: the greater the perceived likelihood that the incumbent will have to displace its own traffic and share facilities, the less attractive the investment becomes. See M. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,* 111 Harv. L. Rev. 621, 624 (1998).[7]

Second is the potential effect on the CLECs' investment strategies. To the extent that they can achieve access to an ILEC's system at less than fully allocated cost, they will tend to reduce or at least defer their investment in their own network facilities. The net result is less long-run competition at the level that compulsory access has been ordered. See IIIA Areeda & Hovenkamp, *supra,* ¶ 771b, at 171 ("Forcing a firm to share . . .. discourages [competing] firms from developing their own alternative inputs"). See also *Iowa Utilities,* 525 U.S. at 429 ("[r]ules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation . . . .") (Breyer, J., concurring) (emphasis in original).

[7] "Governments can create too many property rights and too many decision-makers who can block use," thus deterring efficient use of property. *Id.* at 625. "Ambiguity [in property rights] may arise because of unresolved conflicts and changing values regarding ownership, such as how far the government may restrict certain uses . . . ." *Id.* at 660.

III. THE SECOND CIRCUIT'S "MONOPOLY LEVERAGING" THEORY SHOULD BE OVERRULED

In addition to holding that respondent had an essential facilities claim against petitioner, the Second Circuit stated the plaintiff "may have a monopoly leveraging claim." Pet. App. at 30a. To sustain this claim, the court said that the plaintiff would have to show that the defendant:

> (1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.

Id., quoting *Virgin Atl. Airways Ltd. v. British Airways PCL*, 257 F.3d 256, 272 (2d Cir. 2001). This approach follows from the Second Circuit's earlier dicta where it had said:

> [T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of Section 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

The *Berkey Photo* doctrine is simply incorrect, and this Court should take this opportunity to reject it.

A. "Competitive Advantage" Is Not An Appropriate Basis for Imposing Section 2 liability.

The Court set forth in *Spectrum Sports* a clear, and well accepted, articulation of the scope of Section 2: "Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." 506 U.S. 447, 458 (1993). It thus eliminated an aberrant Ninth Circuit line of cases that would allow attempt to monopolize claims without proof of any dangerous probability of success in achieving a monopoly. The Second Circuit's analysis here suffers from the same type of fault: using one's monopoly to "gain a competitive advantage" is neither monopolization nor attempted monopoly; and quite to the contrary, legitimate monopolists are encouraged to compete vigorously and seek competitive advantages based on their own "skill, foresight and industry." *Alcoa*, 148 F.2d at 430.

To the extent that the Second Circuit's approach is drawn from this Court's jurisprudence, it perhaps goes back to some language about "competitive advantage" in *United States v. Griffith*, 334 U.S. 100 (1948).[8] There the defendant movie theater chain was charged with using its monopoly power in some towns to obtain monopolistic prices on films exhibited in towns where there were competing theaters. *Id.* at 108 (films were "licensed on a non-competitive basis on what would otherwise be competitive situations"). Yet *Griffith* is distinguishable from the present case and is not inconsistent with the Court's later *Spectrum Sports* decision.

---

[8] Because "the prevention of competition" was illegal under the Sherman Act, it "followed *a fortiori* that the use of monopoly . . . to foreclose competition, to gain a competitive advantage, or destroy a competitor, is unlawful." *Griffith*, 334 U.S. at 107.

Griffith represents a case that could be characterized as the use of monopoly power in one market to attempt to achieve a monopoly in the competitive towns.

In any event, the "monopoly leveraging based on competitive advantage" theory has been largely confined to the Second Circuit Court of Appeals and has been somewhat unevenly applied there. See *Virgin Atl. Airways Ltd.*, 257 F.3d at 272 (use of dominance on some routes to gain competitive advantage on others is illegal). The Federal Circuit and most other Courts of Appeal have generally rejected the *Berkey* type of monopoly leveraging doctrine. See, e.g., *Intergraph Corp. v Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), and *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 n.18 (7th Cir. 1986). But there is a lot of continuing litigation and confusion. See 3 Areeda & Hovenkamp, *supra*, ¶¶ 652b (discussing cases), & 652c at 97 ("many leveraging claims are really complaints about the defendant's greater efficiency or aggressiveness, and our unwillingness to turn the antitrust laws into a statute that protects firms from 'unfair' but non-monopolistic practices").

B. As in *Cooperweld*, *State Oil* and *Spectrum Sports*, this Case Offers an Opportunity to Put to Rest an Aberrant Body of Law

Private plaintiffs have every reason to try to squeeze "unfair competition" tort cases into an antitrust mold–thereby gaining automatic trebling of damages and attorneys fees for the successful plaintiff. The "monopoly leveraging" theory espoused by the Second Circuit fits right into this history. It is little more than the source of occasional error, prolonged litigation and considerable confusion.

Having "torts masquerading as antitrust violations" is not new to this Court. It was very much present in the infamous "intra-enterprise conspiracy" doctrine which this Court dispatched to the graveyard in *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752 (1984).. It was also present in the "no dangerous probability of monopoly" doctrine under Section 2 of the Sherman Act, which this Court eliminated in *Spectrum Sports*. And ideas of unfair competition were very central to the "maximum price fixing" doctrine under Section 1, which this Court struck down in *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

The Second Circuit's decision below on "monopoly leveraging" reflects the same kind of spirit. It is infinitely more about protecting *competitors* than promoting *competition*. Accordingly, this Court should dispatch the doctrine, with its inappropriate echoes of *Griffith*, to a quiet grave; and, in so doing, the Court should make clear that a legitimate monopolist violates Section 2 only when it attempts to monopolize a second market by predatory means or takes exclusionary steps to maintain an already existing monopoly in the second market.

If the Court reverses the Second Circuit's decision and eliminates its "monopoly leveraging based on competitive advantage" theory, then there is no remaining basis for plaintiff's complaint. Accordingly, dismissal under Rule 12(b)(6) is the appropriate remedy.

CONCLUSION

The Court of Appeals decision should be reversed.

Respectfully submitted

ANDREW L. KURTZMAN
DEREK R. KHLOPIN
TELECOMUNICATIONS
INDUSTRY ASSOCIATION
Suite300
2500 WILSON BLVD
Arlington, VA 22201
(703) 907-7700

DONALD I. BAKER
(Counsel of Record)
W. TODD MILLER
BAKER & MILLER, PLLC
Suite 1000
915 15th Street, NW
Washington, DC 20005
(202) 637-9499

May 23, 2003